Supreme Court, U.S.
FILED

(1)

001725 MAY 15 2001

NO.

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IN THE

SUPREME COURT OF THE UNITED STATES

RASIK S. SANGHVI
Petitioner

v.

PHILIP FRENDEL
FRANK RESTINA
WORKERS' COMPENSATION BOARD
(OF NEW YORK STATE)
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 2ND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RASIK S. SANGHVI *Esq., Prose*
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132 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals 2nd Circuit erred in believing ***tainted, manufactured, falsified, manipulated, confessedly fabricated and conjured up*** evidence of performance problem as a legitimate non discriminatory explanation of the employers for adverse employment actions including the constructive dismissal in denying petitioner's appeal for the reversal of Summary Judgment of the Eastern District Court of New York in stark contrast to the U.S. Supreme Court's ruling in Reeves v. Sanderson Plumbing Products Inc. 99-536 (U.S. 6/12/2000).

Whether the United States Court of Appeals 2nd Circuit erred in not considering the independent witnesses and the documents presented by the petitioner contradicting the respondents' non discriminatory explanation and proving pretext as per burden shifting method first articulated in McDonnell Douglas Corp. v. Green, 411 U.S.

792 (1973) , thus putting in question the fundamental principle of due process rights and signaling the departure from the accepted and usual course of judicial proceeding.

Whether the United States Court of Appeals 2nd Circuit erred in believing the flimsy excuse of disputed performance problem as legitimate nondiscriminatory explanation for not hiring the petitioner engaged in protective activity in subsequent job openings and where *impermissible factor was* the motivating factor and where the petitioner was not afforded the burden shifting McDonnell Douglas Corp. method of presenting independent evidence in third leg proving pretext when the petitioner was nine times more reachable, most experienced and objectively most competent than any many other hired candidates contradicting the non discriminatory explanation of the respondents.

Whether in light of the overwhelming evidence of existence of genuine issues of material facts, the United

States Court of Appeals 2nd Circuit erred in rejecting the petitioner's appeal for reversal of summary judgment. The respondents have confessed in the depositions of the falsification of ratings based on which the justification of nondiscriminatory explanation were originally articulated and still believed by the Court of Appeals without considering the issues of material facts of timing, use and method which were the reasons of manipulation, fabrication and actual pretext.

Whether the United States Court of Appeals 2nd Circuit erred in neglecting to balance the employers' rights of business decision with the specific protection ingrained under 42 USC Sec. 2000e-3 to the persons who seek justice. If the Summary Judgment would have been reversed there was an opportunity for the fact finders to uncover yet continuous 7 years of discrimination, retaliation, banishment from law career of the petitioner and destroying the best

vears of his productive life for the only reason of daring to seek justice in the courts.

Whether the Court of Appeals for 2nd Circuit erred in not addressing issue of prima facie evidence de novo particularly regarding the district court's addressing an issue of qualification of the petitioner where an independent eye witness's testimony in favor of the petitioner was rejected because of witness's several decades ago disagreement with the board (respondents) and all other facts and documents but weighing most favorably the falsified ratings of the respondents in an attempt to address the qualification issue where all other requirements were fulfilled to prove prima facie evidence and intentional discrimination and retaliations. Whether such an error affects petitioner's fundamental constitutional rights of equal protection and due process as well as the accepted principle of the courts only

ruling for summary judgment when there are no issues of material facts to consider and the judgment can be given in favor of moving party as a matter of law.

Whether the United States Court of Appeals for the 2nd Circuit erred in not reconsidering and reversing the dismissal of plaintiff's 42 U.S.C. §1981, §1983 and §1985 claims, which were based on factual errors like the case was pleaded on National Original solely when the facts are contradicting the opinion. Further the continuous retaliation until now in 6 years after filing the complaints in EEOC & courts when the plaintiff is black listed for any job in legal careers in state after more than 400 applications for an attorney or equivalent position rejected by the different hirers in different places and in different agencies rejecting the plaintiff when prior to seeking justice he was offered a legal position after only 10 applications as against unsuccessful 400 applications. If this is not a material issue for jury to consider conspiracy under 42 U.S.C. §1983 & §1985 what else it could be?

Whether the United States Court of Appeals for the 2nd Circuit erred in not reconsidering and reversing the dismissal of plaintiff's state tort claims of intentional infliction of emotional distress when the intentional and reckless actions of a supervisor wrongly and permanently harmed three generations of the plaintiff's family, deprived him of his hard earned fruits of his law career achieved late in his life in this country and ruined the life of the petitioner in many other respects.

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STATUES & CONSTITUTIONAL PROVISIONS

Title VII of the Civil Rights Act of 1964

42 U.S.C. 2e to 2000e-17 (amended in 1972, 1978 and by the Civil Rights Act of 1991)

New York Human Rights Law Sections 291, 296

28 U.S.C. Sections 1331, 1343, 171

42 U.S.C. Sections 1981, 1983, and 1985 (3) as amended by Civil Rights Act of 1991

Title 28 U.S.C. 1291

42 U.S.C. § 2000e-5(j)

4 2 U.S.C. § 2000e-3(a)

29 U.S.C. § 2601 (b) The Family & Medical Leave Act

29 U.S.C. § 203(d) The Fair Labor Standard Act

OPINIONS BELOW

The summary order (00-7538) from the United States Court of Appeals for the second Circuit is not published but was issued on the 8th Dec. 2000.

The Memorandum Ruling (96 CV 5133) from United States District Court, Eastern District of New York was not published but issued on 04-05-2000.

The Memorandum and Order (96 CV 5133) from United States District Court, Eastern District of New York was issued on January 6, 1999.

JURISDICTION

A petition for penal rehearing and rehearing en banc (007538) was denied on February 28, 2001. The summary order (00-7538) of the United States Court of Appeals for the second circuit was issued on the 8th Dec. 2000. . The jurisdiction of this court is based on 28 U.S.C. § 1254 (1). For timely filing requirements Supreme Court Rule 13.1 & 13.3 were followed. The petitioner seeks the reversal of the

United States Court of Appeals for the second circuit Summary Order that is in conflict with the petitioner's 14th amendment constitutional equal protection rights and due process rights. The summary order violates plaintiff's rights under 42 U.S.C. § 2e to 2000e- various subsections, 42 U.S.C. § 1981, §1983, §1985. The Court of Appeals for the second circuit order conflicts not only with the judgments of all the other circuits but the United States Supreme Court also in similar situations and the fundamental principle of fairness and justice. 14th amendment rights of due process and equal protection of laws for United States Citizens have been knowingly and deliberately mocked and violated under the misunderstood and illegal cover of violations during and beyond probationary employment period.

STATEMENT OF THE CASE

This case is about the series of discriminations meted out to the petitioner, continuing retaliations, continuous conspiracy

ultimately evolved into depriving the petitioner of a law career into New York State, violations of petitioner's equal protection rights under 14th amendment and other rights under 42 U.S.C. § 2e to 2000e- various subsections, 42 U.S.C. § 1981, §1983, §1985, Federal and State constitutions, intentional infliction of emotional distress on the three generations of petitioner's family.

As the complaint outlines the petitioner was constructively dismissed by forcing him to resign by giving him a first false negative evaluation and ***threatening him simultaneously*** with second such negative evaluation unless the resignation was not submitted, as evidenced by the deposition of an independent Board Officer- Mark Solomon. On the basis of obtaining resignation from the petitioner as the deposition of the defendants revealed and later confessed by them the second evaluation was fabricated to a positive one.

The bias and discrimination culminated into constructive dismissal of the plaintiff on December 24, 1994 and retaliations. The tools used by the defendants were the performance evaluations, which were tainted by their falsity, association, simultaneity, and use as a tool in illegal purposes. The evaluations were fabricated, falsified, manipulated and manufactured in relation to obtaining illegal resignation as shown by the defendants' own confession. The petitioner was discriminated in assignment of highest workload to the extent of deliberately attempting to harm his performance as evidenced by the deposition of an independent eyewitness veteran attorney -Gerald Sultan. There are many other acts of discriminations, retaliations, defamation, slander, infliction of emotion distress etc. as the complaint outlines in detail.

ARGUMENT

The petitioner is a naturalized USA citizen but was born in India. The petitioner is of a secular nature and was born in a

Hindu-Jain religion, which preaches its followers non-violence and vegetarianism. The petitioner was the first and only minority candidate appointed and serving at the time in Uninsured Employers' Fund of the Board as a Senior Attorney and treated differently, discriminatorily, cruelly and harshly culminating into petitioner's constructive discharge. These adverse actions were meted out to the petitioner because of intolerance, bias and discrimination for reasons of petitioner's National Origin, race, religion and ethnicity. The position remained open and filled by the other white and non-Indian origin candidates by new hiring.

The plaintiff was found qualified and hired after passing & achieving up to 95 score out of 100 in New York State's Legal Specialty exam # 20-131 and selected from among numerous interviewees for one permanent journey level grade 25 Senior Attorney Position at that department at that time in Nov.1993 after due interview in English. The plaintiff was admitted for a course in Taxation in LL.M in William Mitchell College of Law in Minnesota and passed the New York State Bar

Examination after found eligible to take bar examination based on plaintiff's first degree in law LL.B from India- a common law country, equivalent in time and quality to that of J.D. or LL.B. in USA. As far as the plaintiff is aware, the plaintiff was hired on merit and not on any affirmative action program. From all independent performance assessments, the plaintiff can be found competent and qualified for the job. These include an eye witness assessment by an impartial veteran Board Attorney who was in position to observe the plaintiff daily, the lack of any meeting or conference between the plaintiff and the defendant supervisor regarding any performance matter, the fact of independent handling of administrative as well as Board hearings for 13 months. Even a frivolous memo used by the defendants in their evaluation to raise the performance issue is a constructive and subjective in nature advising the plaintiff to be more assertive which clearly shows that there was no performance problem until manufactured in the evaluation. There are duplicate evaluations and contradicting each other for the same period of time. The plaintiff was evaluated by the first supervisor

for first six months in about four months of appointment and was found competent in all respects except having legal experience, as a newly hired (Exhibit in Court of Appeal's Appendix). For the same period but after four and half months, after a good faith memo of plaintiff respectfully raising concern about effect on his functioning due to excessive travel the defendant supervisor gave a duplicate, contradictory negative evaluation which was part of manufactured evaluations by the defendants as claimed by the plaintiff and later confessed by the defendants. The first supervisor was satisfied and pleased with plaintiff's performance after clarification about some initial adjustments. As mentioned in plaintiff's comments titled Trainee's Comments and Responses (Docket # 92 dated 1/14/00) plaintiff had explained to Mr. Lazarus and clarified the misunderstanding. The Lower court has grievously erred in raising outdated, routine, resolved and common preliminary adjustments related matter to justify an adverse decision. The lower court had ***erroneously quoted only partial memo*** of Mr. Lazarus in its decision to raise

performance problem which the Court of Appeals has erred in not correcting which has greatly harmed the petitioner. The lower court grievously omitted that Mr. Lazarus had noted that the writing was not for presentation (but a note for discussion as per petitioner). The work was an outline and rough draft in English but in vernacular grammar mode not intended for presentation and was due to a cultural trait followed by many successful professionals from multi language back grounds for keeping excellence in thread of thoughts. The plaintiff never followed that cultural trait afterwards. The lower court also ***grievously*** did not mention that second meeting was scheduled. ***The fact that Mr. Lazarus subsequently gave a positive evaluation and assigned more districts and complicated Board hearings to petitioner which he handled for 13 months independently thereafter were omitted by the lower court.*** As Mr. Lazarus never questioned plaintiff's works after clarification and as plaintiff's numerous filings of appeals and briefs, which were presented in the next level Board hearings and as there were no more apprehension after the second scheduled meeting

with Mr. Lazarus as mentioned in his memo (Defendants' Exhibit A as entered in Docket # 92), the subsequent first evaluation on April 7, 1994 -six weeks after first meeting contained only positive comments. In fact to have mentioned initial adjustments after the unbiased supervisor was thoroughly satisfied with the performance of the plaintiff was the ***strong evidence of defendants desperate pretext particularly in light of availability of abundant independent evidence and facts.*** The lower courts strangely stalled at the feeble articulation of a desperate excuse by the defendants and did not examine the naturally followed next level of existence of independent facts in evidence shifting McDonnell Douglas Corp. v. Green 411 U.S. 792, 802 method which is recognized as fair method of resolving the disputes of existence of genuine issues of material facts.

The only hints of why the lower courts may have weighted (wrongly) one particular eyewitness testimony can be found in Honorable Judge Melancon's summary order that an independent witness -board Attorney Gerald Sultan had

an alleged disagreement several decades ago with the board! An eyewitness testimony of Attorney Gerald Sultan would have been found very relevant and of probative value by the Jury. But a decision was made solely on the interested party's self serving allegations of performance problem without existence of any trace of believable evidence. Even the facts of independent handling of regular as well as Tribunal hearings for 13 months were ignored, together with another board officer _ Mr. Mark Solomon's testimony that the second negative evaluation was predetermined simultaneously at the same time the first disputed negative

ratings were given to the petitioner. Despite these facts the lower court erroneously misstated that the second negative ratings were not simultaneously conveyed which requires to be corrected. This is of critical importance because if the two negative ratings were simultaneously conveyed as Mr.

Mark Solomon's testimony shows, it independently proves falsity and connectivity of the pair of ratings in addition to confessed fabrication of a ratings by the defendants, which has been found and termed, manufactured even by the

district court. After the revelations and contradictions in two defendants depositions the defendants have confessed that the second ratings were fabricated on the basis of resignation.

Similarly, Ms Lubetkin was present when the illegal pressure to resign was exercised in last meeting and who was party to fabrication. Her self serving interested party internal memo is similar to memo "prepared for litigation" in People v. Foster 27 N.Y.2d 47 (1970) and the lower court erred in not rejecting her self serving memo.

However the most astonishing act of lower courts was that they believed an exposed fabricated, false, manipulated, manufactured and tainted pair of evaluations presented by the defendants as an adequate articulation of proffered non-discriminatory explanation as a basis of their decision.

Combined with stalling abruptly in respondents favor- a moving party without affording an opportunity to the petitioner that the legitimate reasons offered by the defendants were not its true reasons but were a pretext of

discrimination as emphasized In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 the acceptance of tainted and fabricated pair of evaluations as a basis of finding a non existent performance problem is a double error. In oral argument one of the Honorable judges opined that Reeves v Sanderson Plumbing Products Inc. No. 99-536 (U.S. 06/12/2000) did not necessarily force fact finder to find an intentional discrimination automatically because the proffered reasons submitted by the defendants were unworthy of credence. The petitioner agrees one hundred percent with the honorable judge. But the petitioner maintains that the defendants not only presented unworthy proffered reasons but in the present case presented also false, manufactured and manipulated a pair of evaluations and carefully used them as a tool in an illegal action of confessed fabrication of documents, which should have been at least disbelieved as a legitimate nondiscriminatory explanation to allow and permit the trier of facts to examine other independent evidence together with attempt at falsity of proffered reasons in a trial either to find or reject the claims

of intentional discrimination. In such circumstances of grave and genuine issues of material facts, it is an error on the part of the lower courts to have allowed summary judgment in favor of moving and guilty party. The petitioner's Memorandum of Law in Opposition to Summary Judgment, Joint Proposed Pretrial order, Court of Appeals Brief, Reply Brief, Petition for Rehearing in banc and other documents contain detail evidence in support of petitioner's claims as above.

Besides, falsity, fabrication, manipulation, connectivity and tainted ness of a pair of ratings given to petitioner in a desperate attempt to raise a non existent performance problem by the defendants and which are the main basis of lower courts ruling in favor of defendants in granting a summary judgment there are these independent evidence of the petitioner's arguments of non-existence of any performance problem.

1. The eyewitness testimony of daily observing 75 years old veteran Attorney in the board Mr. Gerald Sultan.

2. Another Board Officer and Union Representative at that time Attorney Mark Solomon who testified that at the time the first evaluation was given it was known that petitioner would be given second negative ratings

(unless of course, the petitioner resigned). In any case the first evaluation was deliberately 4-1/2 months late and there was no reasonable time given to improve before second evaluation was due even if *arguendo*, there was a performance problem, showing that ratings were false and used as a tool to obtain the illegal resignation. The ratings were fabricated as confessed by the defendants proving that they were unworthy of credence and should not have been used by the lower courts as a basis of granting summary judgment.

3. The defendants in their diatribe have stated that the petitioner was not neat, had a problem with support staff was not organized etc. besides stating that petitioner had

performance problem. The pretext of performance problem is exposed by falsity and fabrication of ratings, the independent eyewitness accounts, independent handling of largest number of districts and complicated Board Hearings for 13 months, Mr. Solomon's testimony of simultaneity of ratings. Interestingly, the defendants other diatribes are also exposed by the six other highly respected supervisors of the petitioner in more credible agency of New York State, Dept. of Taxation & Finance. These six other mostly all American Supervisors have given ***outstanding and highly effective ratings*** to the petitioner and have incidentally stated that petitioner is highly organized very helpful to the department staffs, very personable, articulate etc. completely contradicting lone person defendant accusations. Why six other supervisors would not be relevant to the accusations of work habit issues raised by the lone accuser as the other defendant was in Albany all the times and had no personal experience of the petitioner? The sworn affidavits of two supervisors contradicting diatribes of the lone defendant are on file. The other supervisors have agreed to testify in trial besides

documents in the file in the form of unbiased non-fabricated ratings in the court files.

4. Unlike Mr. Frendel at the time of heading Uninsured Employers' Fund and who was on provisional status, the petitioner was selected on passing the examination and on merit and for permanent position. The petitioner had wide experience in different fields and in different countries. The petitioner passed the New York State Bar Examination without any help from any Law College in United States and was admitted to LL.M. Course in William Mitchell of Minnesota in Taxation. Even the Honorable Judge of United States District Court of Southern District took note of this achievement of petitioner during the sworn in ceremony of newly admitted attorneys in 1993. As has been stated earlier the petitioner was selected for the Attorney position in the Board on merit achieving 95 out of hundred scores duly interviewed in English by non-known interviewer from scores of candidates and interviewees. This is in contrast to about 400 applications, up to 100 scores out of 100 in several results, about 6 mixed motives interviews after the filing of

this suit. This has relevance to qualifications, retaliations and conspiracy issues.

5. There is a flawless evidence of 13 months of independent handlings of largest number of hearing points and districts including complicated Board hearings by the petitioner. This is an issue of fact for Jury to decide if there was any performance problem would any sane supervisor entrust more hearing points, more districts and complicated hearings to a newly hired attorney.

The petitioner has been mocked and retaliated by the defendants when he was eligible and applied for the new positions both in the same department Uninsured Employers' Fund where he was working previously
and in a department by the same individual defendants and by another officer of the board, respectively.

The position in the same department was under the same

Individual defendants who were also the interviewers and the hirers. The defendants were not sincere but the petitioner was unaware and desperate for restoring his legal career. Only communication exchanged was whether the petitioner wanted to come back. The petitioner pleaded in affirmative. The petitioner was not hired. The defendants argued and the Court of Appeals allowed that the petitioner knew about the petitioner's performance problem so they had articulated a legitimate nondiscriminatory explanation. Again the Court of Appeals stalled at this level without affording the petitioner opportunity to prove that the proffered explanation was not true reason but a pretext for discrimination and humiliation.

First, if the defendants knew that there was a performance problem and the petitioner was not a suitable candidate why was he called for an interview? It was documented to Court of Appeals that the interview was not compulsory. Secondly, there was no change in any respect in that short time in petitioner's legal background or profession (except

that the petitioner had received a right to sue letter and was in process of filing the law suit in Federal Courts for his suffering injustices and the defendants knew about that) and this was clear in the resume mailed before the interview sufficient in time to analyze. This point alone exposes the defendants' proffered reasons as not true reasons but pretext. It also shows prima facie violation of petitioner's 42 U.S.C. section 2000e-3.

Thirdly, there was no exchange other than the petitioner's willingness to come back. There was no exchange about working hard to improve, for example or taking corrective classes if there was a genuine concern about a performance problem, if there was one at all.

The second interview for the Attorney position was in the conciliation department of the board. The petitioner had about 7 years of experience in working with conciliation conferences as an advocate in anther NY state agency. There were nine positions, which were all filled against only one when the petitioner was hired earlier in the board without

any relevant experience in this country. The defendants have disclosed that only 4 of the 9 candidates had the same or more score than score of the petitioner. This department was different with different legal duties and the hiring officer was a different Board officer. The petitioner had passed New York State Bar Exam and had independently handled trial in different districts for 13 months in the same agency. The hirer did not fairly and non discriminatorily considered the possibility of petitioner's more suitability for a different position in light of the petitioner's relevant experience and reachability, even if he knew about alleged performance problem in another department, as the explanation offered this time was a same stereo type accent and spoken English problem excuse(there was no writing in an interview). There is a serious reason to disbelieve this excuse, as another officer of the same Board before filing a Federal complaint by the petitioner had obviously found the petitioner quite adequate in spoken English as well, having selected him from scores of interviewees and candidates after a due interview in English for just one position as against 9 positions available this time.

This fair and nondiscriminatory consideration would have been a litmus test of Board's unbiased dealing with the petitioner. The defendants have failed this critical test raising the probability of bias, retaliation, conspiracy and discrimination. The Court of Appeals stalled at this level without affording the petitioner opportunity to prove that the proffered explanation was not true reason but a pretext for discrimination and retaliation. If the defendants knowledge of plaintiff's alleged performance problem is allowed as final justification by all the courts for adverse employment actions without affording the petitioner a chance to prove the explanation as a pretext as has been done in the present case, there would be no meaning of 42 U.S.C. 2000e-3. All defendants have to do is to assert knowledge of petitioner's performance problem alleged by themselves and that would be it. This would have been even more ridiculous than a discrimination case established finally by a member belonging to any one of the scores of minority groups get job somehow, stop working for the employer and when fired claim adverse employment action as a

discrimination when the position remains open for other candidates and filled naturally by any other person. To save from such a mockery we have carefully established evidence shifting McDonnell Douglas Corp v. Green 411 U.S. 792, 802 case methods as explained in St . Mary Honor Center v. Hicks 509 U.S. 502, 511 and Texas Department of Community Affairs v. Burdine 450 U.S. 256 etc. If the lower courts themselves for the economic, political business pressure, administrative ease or overwhelming court burdens began to compromise such fundamental concepts and tools of fairness in such vital areas as some one's living, career, honor and families there will be critical dissatisfaction with the judicial system which may end up spending thousands of times more and other affirmative actions anew before the trust in Human Rights are restored, if at all.

The petitioner's 1981 claims were dismissed by the district court erroneously. The dismissal was termed failure to state a claim. The court quoted only one complaint number where

the petitioner had stated and meant National origin as one reason of discrimination.

The district court had erred because in plaintiff's amended complaint page 7 line 10, he had clearly stated that he claimed violations on more than one type of discrimination. The national origin is expressed and obvious in conduct but the expressed violation is only the tip of the iceberg and the real violations are in the pattern of the outrageous and unaccepted uncivilized conduct of various ways of discrimination. It is impossible for a prose complainant to plead instantly all violations artistically and perfectly when he is not aware of what hit him because of rarity (in his case, so far) and unnaturalness of the kind of discriminatory actions. It is with series of analysis of facts, evidences and continuous and relentless discriminations and retaliations that one sadly comes to ugly reality that there were something uglier underneath like racism and conspiracy. Besides, as evidenced by the petitioner in his own deposition the defendant Philip Frendel had indeed made a racial

remark in stating plaintiff on face that he did not like petitioner's face betraying the defendant's contempt and hatred for petitioner's facial feature and light brown skin signifying racism and Hindu-Indian ethnicity. Keeping open exactly such a possibility the Federal Rules of Civil Procedures Rule 8(f) states that all pleadings shall be so construed as to do substantial justice.

People from India face a very subtle and unique discrimination. Unlike any other non white immigrants the Indians are emigrating from a major democratic country with same appreciation and outlook for freedom, justice and equality as professed by majority or many generation citizens of USA and democratic Europe. The democratic qualities of freedom, justice and equality which are appreciated generally are not tolerated by some bias persons when practiced by first generation immigrant whose accent is different, who looks different and who is not expected to be like Americans and Europeans in his

value systems. Actually, these qualities create resentment among very few biased persons particularly if these new immigrants are independent minded, freedom loving, believing in equality and aspire for an important position such as Attorney. In short if it looks they act like whites, work like whites and are not whites or many generation Americans the inherent discrimination in some peoples minds comes out on surface in case of democratically saturated people coming from India. The petitioner does not know this peculiar discrimination and intolerance towards people from India is a race based or national origin discrimination.

"The general rule in appraising the sufficiency of a complaint for failure to state a claim is that a complaint should not be dismissed "***unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' CONLEY VS. GIBSON, 1957, 355 U.S. 41, 45, 46, 78, S.Ct. 99, 102, 2LEd 2d 80; SEYMOUR VS. UNION NEWS COMPANY, 7 Cir., 1954, 217

F.2d 168; and see rule 54c, demand for judgment, FEDERAL RULES OF CIVIL PROCEDURE, 28 USCA: "***every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." U.S. V. WHITE COUNTY BRIDGE COMMISSION, 2 Fr Serv 2d 107, 275 F2d 529, 535

"A complaint will not be dismissed for failure to state a claim, even though inartistically drawn and lacking in allegations of essential facts, it cannot be said that under no circumstances will the party be able to recover." JOHN EDWARD CROCKARD VS. PUBLISHERS, SATURDAY EVENING POST MAGAZINE OF PHILADELPHIA, PA (1956) Fr Serv 29, 19 F.R.D. 511, DCED Pa 19 1958.

As regards summary dismissal of 42 U.S.C. §1983 in relation to 42 U.S.C. §1985 the facts are that over 6 the years after the filing of complaint continuous discrimination and conspiracy has emerged. The petitioner has been black listed by the different New York State sister agencies of the defendants as

a result of which even with some times 100 score out of 100 for some positions and from 90 to 98 scores for many other positions in a New York state legal examination from which entry level attorney positions in the state agencies are filled and after 6 years of continuing on the available list and about 400 applications the petitioner has not been even granted interviews except for 4 or 5 occasions (other than by defendants used for retaliations) out of which 2 times the mocked interviews were staged by two different agencies immediately after the complaints about hiring procedure were made to the New York State Dept. of Civil Service. The interviews required about 10 hours of total commuting and about $150.00 of expense for each interview and the questions had not very subtle clues about the mockery of interview. The non hired status, 400 hundred applications and the ratio of interviews to applications are in sharp contrast to the petitioner's pre federal complaint filing experience where he was hired after about 5 or six applications and in a first interview and are in sharp contrast to the experiences of other thousands of applicants who have

not participated in a legal redemption process as guaranteed under 42 U.S.C. 2000e-3. ***This form of continuous discrimination and retaliation cannot be committed without conspiracy***. If this case is returned to the lower courts for review as this petition for writ seeks, the petitioner intends to prove also this continuously evolving conspiracy by subpoenaing the information as to how many candidates were there unemployed in legal field after 6 years of continued availability and 400 applications and the information about the qualifications of who were selected compared to those who were not etc. and other scores of trial methods.

The petitioner has been subject to intentional infliction of emotional distress as explained above by the mock interviews staged by the defendants themselves and other officers of the board to humiliate the petitioner. The petitioner was intentionally and cruelly denied family leave when his father was seriously ill and his mother has just died. The petitioner's children and wife have been greatly distressed

due to intentional acts of the defendants to deprive the petitioner of legal career. Thus three generations of petitioner's family have been affected in this Intentional and grossly reckless behavior of the defendants.

The petitioner has been defamed and humiliated for the false allegations of performance problem and fabrication of pair of manipulated ratings of the petitioner. The defendants intentional discriminatory actions have resulted in long and now almost lifetime deprivation of Petitioner's cherish dream of a legal career. The petitioner has lost faith in positive attitude in life and has become skeptic, which has permanently damaged petitioner's trustful psyche.

CONCLUSION

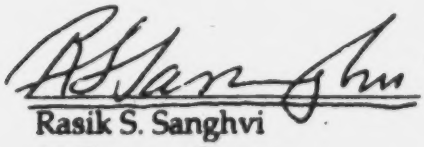
In view of the above facts, the petitioner Rasik S. Sanghvi respectfully requests that the United States Supreme Court reverse the lower court's summary judgment motion granted in favor of the respondents.

Respectfully submitted,

Dated:

Staten Island, NY

May 12, 2001



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE

40 FOLEY SQUARE

NEW YORK 10007

ROSEANN S. MACKECHNIE

CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of February two thousand one.

Rasik S. Sanghvi,

Plaintiff-Appellant,

V.

Dkt. No: 00-7538

Philip Frendel, Frank Restina
Workers' Compensation Board
(of New York State),

Defendant-Appellees

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Rasik S. Sanghvi.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that

heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: Beth J. Meader

Beth J. Meador,

Administrative Attorney

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT. BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York,

9th day of Dec

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thousand.

PRESENT:

Hon. John M. Walker, Jr.,

Chief Judge,

Hon. Rosemary S. Pooler,

Circuit Judge,

Hon. Janet C. Hall,*

District Judge.

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RASIK S. SANGHVI, 00-7538

v. Plaintiff-Appellant,

PHILIP FRENDEL, FRANK RESTINA,

WORKERS' COMPENSATION BOARD

(OF NEW YORK STATE) Defendants-Appellees.

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The Honorable Janet C. Hall of the United States District Court for the District of Connecticut, sitting by designation.

APPEARING FOR APPELLANT:

RASIK S. SANGHVI, Pro Se

New York, NY

APPEARING FOR APPELLEE:

CONSTANTINE A. SPERES,

Assistant Attorney General,

(Eliot Spitzer, Attorney

General of the State of New

York, Marion A. Buckbinder,

Assistant Solicitor General,

Michael Belohlavek,Deputy

Solicitor General, on the

brief)New York, NY

Appeal from the United States District Court for the Eastern District of New York (Melancon, J.).**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the

judgment of the district court be and it hereby is **AFFIRMED**.

Plaintiff-appellant Rasik S. Sanghvi appeals from a judgment of the United States District Court for the Eastern District of New York (Melancon, J.) dated April 5, 2000, dismissing his complaint, granting summary judgment to defendants, and denying his request for reconsideration. Sanghvi brought this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., 42 U.S.C. §§ 1981, 1983 and 1985, the New York Human Rights Law, Exec. Law § 296, and the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et sea. Sanghvi has

alleged that defendants, the New York State Workers' Compensation Board ("WCB"), Philip Frendel and Frank Restina, unlawfully discriminated against him based on his national origin, race, and color by forcing him to resign from a position as a senior attorney with the WCB. Sanghvi also alleges that defendants retaliated against him for filing an EEOC complaint, and that he was subjected to a hostile work environment. Finally, Sanghvi appeals from the Memorandum and Order dated January 6, 1999, dismissing his conspiracy and discrimination claims under 42 U.S.C. §§ 1981, 1983, 1985; claims for intentional infliction of emotional distress under 42 U.S.C.

§ 1983; and a New York State Human Rights Law claim against defendants in their official capacity. We affirm.

Sanghvi worked as a probationary senior attorney in the Uninsured Employers' Fund from November 1993 until December 1994, when he resigned under pressure from his supervisors. Sanghvi received a negative performance evaluation, and defendants had received complaints about Sanghvi's handling of cases. Defendants appellees gave Sanghvi the option of resigning voluntarily before he was to receive a second satisfactory performance review, allegedly to avoid any negative impact on Sanghvi's alternative employment opportunities with the New York State Department of Taxation and Finance. In June 1995, Sanghvi filed a complaint with the EEOC, alleging employment discrimination on the basis of national origin. Subsequently, upon his

application for several positions within the WCB in 1996, Sanghvi was not hired. Sanghvi alleges he was forced to resign because defendants intentionally discriminated against him. Because defendants have

Poffered evidence that Sanghvi was terminated on the basis of unsatisfactory job performance as a senior attorney, which constitutes a legitimate, non-discriminatory reason for terminating him, Sanghvi has the ultimate burden of proving that the defendants' decision was motivated by his national origin. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973). Sanghvi's mere conclusory allegations of discrimination are insufficient to defeat defendants'

application for several positions within the WCB in 1996, Sanghvi was not hired.

Sanghvi alleges he was forced to resign because defendants intentionally discriminated against him. Because defendants have proffered evidence that Sanghvi was terminated on the basis of unsatisfactory job performance as a senior attorney, which constitutes a legitimate, non-discriminatory reason for terminating him, Sanghvi has the ultimate burden of proving that the defendants' decision was motivated by his national origin. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973). Sanghvi's mere conclusory allegations of discrimination are insufficient to defeat defendants'

motion for summary judgment. See Schwapip v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997).

Similarly, with respect to Sanghvi's retaliation claim, we with the district court that although Sanghvi may have established a prima facie case of retaliation, the defendants have produced evidence of legitimate, non-discriminatory reasons for not hiring Sanghvi for a position as a senior attorney in September 1996, or for a position as Conciliator in October 1996. The defendants were aware of Sanghvi's unsatisfactory job performance at the WCB. Because defendants have offered a non-discriminatory reason for their failure to hire Sanghvi, the burden shifts to Sanghvi to prove

discrimination. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998). Sanghvi's conclusory allegations that defendants discriminated against him is not sufficient to defeat summary judgment. Finally, we affirm the district court's grant of summary judgment for the defendants on Sanghvi's Family and Medical Leave Act claim under 29 U.S.C. § 2601 et seq., based upon the denial of Sanghvi's April 22, 1984 request for vacation to visit his father in India. However, we do so on narrower grounds than those relied on by the district court. The district court held that Sanghvi's claim under the FMLA was barred against the WCB, an arm of the State of New York, by the Eleventh Amendment. In the alternative,

the district court held that even if the claim were not barred, Sanghvi failed to established that he gave proper notice under the FMLA of his need for leave to care for his ailing father. We find it unnecessary to resolve the question of whether Congress abrogated the state's Eleventh Amendment immunity in passing the FMLA, because even if Sanghvi's claims, were not barred by the Eleventh Amendment, he has failed to demonstrate that he gave proper notice to his employer of why he was entitled to leave under the FMLA.

Sanghvi sent a letter to Frendel on April 22, 1994, stating that he wished to take two months of leave to visit his father, as his mother had recently died. He labeled the leave as "vacation". The letter failed to indicate that his father suffered from

any medical condition that would qualify as a "serious health condition" under the FMLA. See 29 C.F.R. § 825.114. When requesting leave, an employee need not expressly assert rights under the FMLA or mention the FMLA by name. However, to be sufficient, notice must provide the employer with enough information to make clear that the employee's reason for seeking leave qualifies under the FMLA -- here, that Sanghvi wanted to care for a parent with a "serious health condition" under 29 U.S.C. § 2612 (a) (1) (C). Because Sanghvi failed to inform his employer that his father suffered from a serious health condition, we find that notice was inadequate and did not apprise the WCB of any need to inquire further into the possibility that the requested leave would qualify under the FMLA. See 29 C.F.R. 825.302(c).

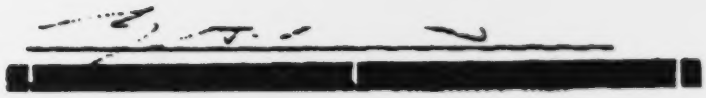
We have considered appellant's remaining arguments and find them to be without merit. For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT

Roseann B. MacKechnie,

Clerk

By:



RALPH A .ANDERSON,

Deputy Clerk

-ACTING OPERATIONS

MANAGER

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UNITED STATES DISTRICT COURT Dated 04-05-00
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

Rasik S. Sanghvi — Civil Action No. 96-5133

versus

Phillip Frendel, et al. — Judge Tucker L. Melancon

MEMORANDUM RULING

Before the Court are defendants' motion for summary judgment, supplemental motion for summary judgment and plaintiffs request for reconsideration of Judge Sterling Johnson, Jr.'s Memorandum Order dated January 6, 1999. For the reasons that follow, the Court will grant defendants' motions and dismiss plaintiff's claims and will deny plaintiff's request for reconsideration.

I. Background

Plaintiff, Rasik Sanghvi ("Sanghvi"), brought this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964,42 U.S.C. § 2000 ***etseq.,*** 42 U.S-C. §§ 1981, 1983 [1] and 1985, and New York Human Rights Law alleging that defendants, the New York State Workers' Compensation Board ("WCB"), Phillip H. Frendel and Frank Restina (collectively "defendants"), unlawfully discriminated against him based on his national origin, race and color by forcing him to resign from a position

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[1]Plaintiff's § 1983 claim is based upon the individual defendants' alleged violation of plaintiffs rights under the Equal Protection Clause of the Fourteenth Amendment.

as a senior attorney Trainee with the WCB. Sanghvi alleges he was also retaliated against for filing an EEOC complaint against the WCB and was subjected to a hostile work environment. Additionally, Sanghvi has asserted state law tort claims for defamation, slander and intentional infliction of emotional distress. Lastly, Sanghvi contends defendants violated the Family and Medical Leave Act of 1993,29 U.S.C. § *2601 et. seq.*, by denying his request for family leave at the time of his father's impending death.

Sanghvi was employed by the WCB as a probationary senior attorney in the Uninsured Employers' Fund ("UEF") from November 20, 1993 until December 23, 1994. As a senior attorney, Sanghvi was responsible for handling administrative hearings for the UEF which required, *inter alia*, review of individual cases, research of relevant law and preparation of legal memorandums. The administrative hearings took place in ten districts

resulting in assignments in various districts for the individual UEF attorneys.[2] The attorneys' assignments. including Sanghvi's, were referred to as"calendar days." Frendel, the UEF representative responsible for managing daily activities and Sanghvi's immediate supervisor from April 8, 1994 until his resignation, was responsible for assigning the calender days.

Sanghvi alleges that he was allotted a greater number of calender days as compared to the other UEF attorneys. He maintains Frendel's disproportionate assignment of calender days to him, when coupled with Frendel's comments regarding

his language skills, religion and eating

[2] The relevant UEF hearings were conducted in the following districts: Albany, Binghamton, Brooklyn, Buffalo, Hauppauge, Hempstead, Newburgh, Rochester, Syracuse and White Plains.

habits, resulted in a hostile work environment.

On or about October 19, 1994, Frendel issued Sanghvi his first formal performance appraisal.[3] The evaluation covered the period firom December 2, 1993 to June 1, 1994, Frendel gave Sanghvi an overall unsatisfactory rating. According to WCB guidelines, Sanghvi's unsatisfactory rating meant that he needed immediate and significant improvement in performance. The October 18, 1994 evaluation was not, however, the first indication that Sanghvi's performance was suffering, In an interoffice memorandum dated February 24, 1994 and addressed to Sanghvi, Donald Lazarus, Sanghvi's supervisor until April 8, 1994, criticized Sanghvi's work as being very poorly written from both a grammatical and substantive view." *Defendants"* Motion for Summary

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[3] Frank Restina the WCB Director of Compliance, was the reviewer of Sanghvi's evaluation

judgment, Exhibit A. Lazarus also pointed out that he had received complaints regarding Sanghvi's mishandling of cases, Id.

Similarly, Elizabeth Lubetkin, the WCB Assistant Director for Operations [4] detailed Sanghvi's problems in an interoffice memorandum dated May 12, 1994 and addressed to Tom Canty, Director of Operations. *Defendants' Motion for Summary Judgment*, Exhibit C. In her memorandum, Lubetkin indicated that Sanghvi might not pass his probationary period. Lubetkin also described allegations that Sanghvi had problems with female staff members. Sanghvi's alleged difficulty with female staff members also resulted in an August 29, 1994 letter from Lubetkin to Frendel documenting Vernice Gaskin's account

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[4] As Assistant Director of Operations, Lubetkin was placed in charge of the UEF with Frendel handling the daily activities of the UEF.

of an encounter with Sanghvi, *Defendants' Motion for Summary Judgment*, Exhibit D.

At some point after he was issued the October 18, 1994 performance evaluation Sanghvi was allegedly informed that his performance had not improved since his first evaluation and that he would receive a second unsatisfactory rating. According to defendants, a second unsatisfactory evaluation during Sanghvi's probationary period would have led to his termination. To avoid this situation, defendants allegedly offered Sanghvi the option of voluntarily resigning. This was allegedly done to avoid any negative impact a termination would have on Sanghvi's prior employment with the New York State

Department of Taxation and Finance. [5]

Although Sanghvi contests the voluntariness of his resignation, he nevertheless resigned from his position as a probationary attorney with the WCB on December 23, *1994. Defendants' Motion for Summary Judgment,* Exhibit L Sanghvi was correspondingly given a satisfactory performance evaluation dated December 1, *1994.* He thereafter returned to his position with the New York State Department of Taxation and Finance.

On June 7. 1995, Sanghvi filed an employment discrimination complaint with the EEOC, In his complaint, Sanghvi alleged that he was forced to resign from, the WCB because of his national origin in violation of Title

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[5] Sanghvi had taken a leave of absence from the Now York State Department of Taxation and Finance while working for the WCB.

VII The EEOC issued plaintiff a right to sue letter on August 1, 1996.

In September, 1996, Sanghvi was again referred to the WCB by the New York State Department of Civil Service for an available position in the UEF. Frendel and Restina conducted an interview and ultimately recommended that Sanghvi not be offered a position.

Sanghvi also interviewed for the position of Conciliator with the District Offices of the WCB in October, 1996. Thomas Pandick, General Counsel to the WCB, conducted the interview and recommended Sanghvi not be hired for the position.

Thereafter, Sanghvi filed the instant action against Frendel, Restina and the WCB. By Order dated May 5, 1997, Judge Johnson granted defendants' motion to dismiss the complaint with respect to the Title VII claims against

Frendel. and Restina. Judge Johnson subsequently dismissed Sanghvi's 42 U.S.C. § 1981 claim, intentional infliction of emotional distress claim, conspiracy claims brought pursuant to 42 U.S.C. § 1983 and 1985, and Fourteenth Amendment and New York Human Rights claims against the WCB and Frendel and Restina in their official capacity by Order dated January 6, 1999.

Defendants filed the present motions seeking dismissal of the remainder ol langhvi's claim,. langhvi opposes the motions and also requests this Court reconsider Judge Johnson's previous ruling.

II Sunimmy Judgment Standard

A motion for sunirnary judgment shall be granted if the pleadings, depositions, and aflIdavits submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P 56;*

Darnet Realty v. 136 Last 56h Street Owners, Inc., 153 F.3d 21, 23 (2d Cir. 1998).

When a party seeking summary judgment bears the burden of proof at trial, it must come forward with evidence which would entitle it to a judgment as a matter of law if the evidence were uncontroverted at trial. *Celotex Corp. v. Catrett*, *477 U.S. 317*,324 (1986). As to issues which the rion-movinZ party has the burden of proof at trial,

> the moving party may satisfy this burden by demonstrating the absence of evidence supporting the non-moving party's claim. M. at 324. Once the movant produces such evidence the burden shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. Celotex Corp. v. Catrett, 477 U. S. 317, 322-23 (1986). The responding party may not rest on mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.*, *477* U.S. 242, 248-49 (1986). If no issue of fact is presented

and if the mover is entitled to judgment as a matter of law, the court is required to render the judgment prayed for. Id. Before it can find that there are no genuine issues of material fact, however, the cowt must be satisfied that no reasonable trier of fact could have found for the rion-moving party, Id.

III. Analysis

A. Title VII

"Title VII forbids an employer from intentionally discriminating against an employee because of that employee's 'race, color, religion, sex, or national origin.'" *Bickerstaff* Y. *Vassar College,* 196)F-3d 435, 445 (2d Cir. 1999), 42 U.S.C. § 20OOe 2(a). When analyzing a claim of discrimination under Title VII, a court must go through the three tier burden-shifling analysis set forth in *McDonnell Douglas v.Green,* 411 U.S. 792 (1973). "Under this framework, a plaintiff bears the initial burden

of proving, by a preponderance of the evidence, a prima facie case of discrimination." *Bick-erstaff,* 196F.3dat446. Ina general disparate treatment case, a plaintiffs prima facie case requires proof of the following: (1) membersIlip in a protected group; (2) qualification for the position; (3) an adverse employment dQrision; and (4) the decision took place under circumstances giving rise to an inference of discrimination, *Austin v.FordModels, Inc., 149 R3* d 148, 152 (2d Cir. 1998). Plaintiff's burden of establishing a prima facie case is *de minimis. Chambers v TRMCopy Centers Corp., 43 F.3d* 29, 37 (2d Cir. 1994). Once established, plaintiffs prima facie proof "creates a presumption that the employer unlawfully discriminated against the employee." Texas *Dep't of Community Affairs v. Burdine, 450 U.S. 248,* 254 (1981).

With the creation of the presumption of the employer's discrimination, "the burden of production shifts to the employer to rebut this presumption by articulating a

legitimate, nondiscriminatory reason for its actions." *Bickerstaff 196* F 3d at 446. Similar to the plaintifFs burden of establishing a prima facie case, the defendant's burden of production is not a demanding one. The defendant only has to introduce evidence that if taken as true, would "permit the conclusion that there was a nondiscriminatory reasonfor the adverse action." *McDonnell Douglas Corp., 4 11 U.S.* at 509. The "defendant need not persuade the court that it was actually motivated by the proffered reason." Id. at 5 10.

"If the defendant proffers a legitimate, nondiscriminatory reason for a challenged employment action, the presumption raised by the prima facie case is rebutted, and drops from the case." *Bickerstaff* 196 F,3d at 446 (citations omitted). The plaintiff then has the full and fair opportunity to demonstrate that, more likely than not, he was the victim of intentional discrimination. Id. This can be accomplished by showing that the proffered reason was

not the true reason for the employment decision andthat race was" Id.

1. Discriminatory Discharge Claim

Sanghvi contends that defendants had a discriminatory motive or intent when they allegedly forced him to resign from the WCB. Defendants argue that Sanghvi cannot prove aprima facie case of discrimination and that his discriminatory discharge claim should be dismissed. Although it is undisputed that Sanghvi is a member of a protected class under Title VII, defendants maintain that Sanghvi cannot establish the remaining elements of his prima facie case, namely: (1) his performance was satissfactory; (2) he suffered an adverse employment action, and (3) his discharge occurred under circumstances giving rise to an inference of discrimination.

a. Qualified Person

The Court finds that Sanghvi has failed to establish that he was qualified for the senior attorney position. Being qualified for a position to satisfy the second element of the plaintiffs prima facie case "refers to the criteria the employer has specified for the position." *Thornely v. Penton Publishing,* Inc., 104 RM 26, 29 (2d Cir. 1997). "Whether job performance was satisfactory (at the time of the termination] depends on the employer's criteria for the performance of thejob-not the standards that may seem reasonable to the; jury or judge," Id. "After all, job performance cannot be assessed

in a vacuum; the ultimate inquiry is whether an employee's performance meets this employer's legitimate expectations." *Meiri* v. Dacon, 759 F.2d 989, 995 (2d Cir. 1985). Unless a plaintiff can show the employer's criteria was made in bad faith, an employer is not compelled to submit the reasonableness of its employment criteria. *Thornley,* 104 F 3d at 29.

There is no evidence in the record which would indicate Sanghvi's October 18, 1994 performance evaluation was made in bad faith. The unsatisfactory performance evaluation shows that Sanghvi was not meeting WCB's expectations. This conclusion is strengthened by Lubetkin and Lazarus' prior criticisms of Sanghvi's performance, which for the most part parallel the performance evaluation. "In determining whether an employee'sjob performance is satisfactory, courts may-as they often must- rely on the evaluations rendered by supervisors." *Meiri,* 759 F.2d at 995. It is clear from the observations of Sanglivi's supervisors that he failed to perform the essential functions of his job satisfactorily.

Although Sanghvi points to his prior work record as proof that he was competent, the Court finds his past experience largely irrelevant. Lazarus, who was Sanghvi's initial supervisor, recognized that Sanghvi had no legal

experience as a newly admitted attorney. Given the uniqueness of the legal profession, an individual who is completely qualified in other lines of work can be utterly incompetent when thrown into the foray of the legal world.

Sanghvi also points to the testimony of Gerard Sultan to support his claim that he was qualified for the senior attorney position. Again, the Court finds Sultan's testimony unpersuasive as Sultan was not Sanghvi's supervisor. Although Sultan served as a WCB attorney for some twenty-four years, he had no input into Sanghvi's evaluations. In fact, Sultan's testimony in support of Sanghvi qualifications is questionable given that Sultan also had a work related conflict with Frendel.

b. Adverse Employment Action

To prove that he suffered an adverse employment action, Sanghvi contends that he was constructively discharged, apparently in an effort to avoid the ramifications of his voluntary resignation.

"A constructive discharge,' satisfying the third element of the prima facie case, occurs when an employer 'deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.' " Spence *v.Maryland Cas. Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993)(citations omitted). "Unless the evidence is sufficient to permit a rational trier of fact to find that the employer deliberately created working conditions that were 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, a claim of constructive discharge should be dismissed as a matter of law ..Id.
(citations omitted). The test for constructive discharge is not "merely whether the employee's working conditions were

difficult or unpleasant." Id. Rather, "an employer is entitled to insist on as high a standard of work performance as it deems appropriate... Id.

Sanghvi supports his claim of constructive discharge by pointing to the fact that the defendants were going to give him a second unsatisfactory evaluation which would lead to his termination. Viewing the evidence in the light *most* favorable to plaintiff, It would appear that the alternatives presented to Sanghvi were not alternatives at all.

As such, *a* reasonable trier of fact could conclude that the possibility of Sanghvi receiving an unsatisfactory evaluation amounted to a constructive discharge satisfying the third element of his prima facie case.

c. *Ultimate Burden of Proof- Intentional Discrimination*

Even if the Court were to assume, arguendo, that Sanghvi has made out a prima facie case of discrimination as related to his termination, defendants have satisfied the burden of producing evidence of the legitimate, no-n-discriminatory reasons for their actions. Defendants have offered evidence Sanghvi was terminated for his unsatisfactory performance and his inability to adequately fulfill. the requirements of the senior attorney position. Because an employer has the right to set forth its own criteria for evaluating an employee's j ob performance, see *Thornley, 104* F.3 d 26, and Sanghvi failed to satisfy such criteria, the Court" finds that the defendants have offered a legitimate, non-discriminatory reason for terminating Sanghvi, Under the McDonnell Douglas burden shifting framework, Sanghvi has the ultimate burden of proving that the defendants' decision was motivated by his race, color or national origin, "Since the court, in deciding a motion for summary judgment, is not to resolve issues of fact, its determination with respect to the circumstances that give

rise to an inference of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive ." *McLee v. Chrysler Corp,, 109* F.3d 130, 135 (2d Cir. 1997). "However, even in the discrimination context, a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997). A court must "carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture."*Bickerstaff,* 196 F.3d at 448. "Thus, the question is whether the evidence can reasonably and logically give rise to an inference of discrimination under all of the circumstances." Id.

Sanghvi has offered nothing more than speculation to challenge the validity of the defendants' decision to terminate his employment. His disagreement with the

defendants' perception of his job performance does not satisfy his burden of proving intentional discrimination. Moreover, Sanglivi's argument that the second satisfactory evaluation was manufactured does not prove that defendants' reasons were false. Defendants admit that the only reason they gave Sanghvi a satisfactory evaluation was to allow Sanghvi to return to his former position without any adverse consequences. The fact that the evaluation was "manufactured" does not indicate in any way that the defendants' reasons were false. Sanghvi has offered only conclusory allegations and subjective feelings of being discriminated against. *Bickerstaff*, 196 RM at 456. 1999)(feelings and perceptions of being discriminated against are not evidence of discrimination)

As the Court finds Sanghvi has failed to present any evidence from which a reasonable juror could conclude that the defendants' decision to terminate him was the product of intentional discrimination, the Court will grant defendants'

motion for summary judgment and dismiss Sanghvi's discriminatory discharge claim.

2. Retaliation Claim

Sanghvi alleges the defendants retaliated against him for filing an EEOC complaint in A~ne, 1996 by taking the following actions: (1) Rcstina and Frendel failed to bire him for a senior. attorney position in September, 1996; and (2) Pandick failed to hire him for a Conciliator position in October, 1996. Without conceding that a retaliation claim exists, defendants contend Sanghvi's retaliation claim isjurisdictionally defective. Defendants argue that because Sanghvi's EEOC complaint only set forth a discriminatory discharge claim and Sanghvi did not file a subsequent BEOC claim alleging retaliation, he cannot now raise a retaliation claim. However, defendants fail to acknowledge "reasonably related rule" which allows a plaintiff to include acts of discrimination in his federal action that occur after the initial EEOC

complaint is filed. *Kirkland v. Buffalo Board ofEd.*, 622 F.2d 1066, 1068 (2d Cir. 1980)~ The reasonably related rule provides that "a plaintiff may bypass this agency exhaustion requirement and bring her complaints for the first time in court only by demonstrating that new discrimination claims are 'reasonably related' to charges that were previously filed with the *EEOC." Malarkey v. 7'exaco, Inc-, 993* F.2d 1204, 1208 (2d Cir. 1993), As the reasonably related rule has been construed broadly to allow redress for most retaliatory acts arising subsequeritto an EEOC filing, Sanghvi's claims of retaliation are not jurisdictionally barred. Id.atI209.

"A prima facie case of retaliation under Title VII requires the plaintiff to show (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff-, and (3) a causal connection between the protected activity and the adverse employment

action." Holt *v- KMI-Continental, Inc.*, 95 F.3d 123, 130 (2d Cir, 1996)(citations omitted). As with a basic disparate treatment claim, the burden of production in a retaliation claim shifts to the defendant to articulate legitimate, non-discriminatory reasons for its actions. Id. Thereafter, "the plaintiff bears the burden of showing that the defendant's explanations are a pretext for the true discriminatory motive." Id.

Defendants apparently do not dispute the fact that Sanghvi participated in a protected activity and suffered an adverse employment action, namely rejection of his employment application after filing an EEOC complaint. Defendants do, however, contend Sanghvi cannot set forth any evidence establishing a causal connection between his protected activity and the adverse employment action.

Although a violation of Title VII can be shown by either direct or circumstantial evidence, a plaintiff will rarely uncover direct evidence of discriminatory intent. *Ramseur v. Chase Manhattan Bank*, *865* F.2d 460, 464-65 (2d Cir. 1989). Therefore, a plaintiff must produce circumstantial evidence from which a reasonable inference of discrimination can be drawn. *McLee v. Chrysler Corp.*, *109 F.3d* 130, 134-35 (2d Cir. *1997).* Circumstantial evidence of a causal connection commonly takes the form of a showing that the protected activity was closely followed in time by the adverse employment action. *Holava-Brown v, General Electric* Co., 189 F.3d 461 (2d Cir.*1999).* In this case, the closest alleged denial of an employment benefit occurred approximately three months after Sanghvi filed his EEOC complaint. Given this relatively short elapse of time, the Court finds Sanghvi has established the third element of his prima facie case of retaliation.

The Court also finds, however, that defendants have produced evidence that they had legitimate, non-discriminatory reasons for not hiring Sanghvi Because Frendel and Restina had personnel knowledge of Sanghvi's qualifications, their decision not to select him was completely legitimate. Similarly, Pandick's assessment of Sanghvi's interpersonal and communication skills observed during the interview process led

Pandick to conclude that Sanghvi did not exhibit the strength in language skills nceessary to be an effective Conciliator. With the inference of discrimination created by Sanghvi's prima facie case of retaliation rebutted, the ultimate burden of proving intentional discrimination lies with Sanghvi. Austin *v. Bord Models, Inc,, 149* F.3d 148, 153 (2d Cir. 1998). Like his discriminatory discharge claim, Sanghvi has failed to offer any proof other than his subjective belief that defendants retaliated against him. Sanghvi's reliance on his personal assessment that he was qualified for the positions is insufficient to prove that

the defendants' stated reasons were false, While it is true that Sanghvi had thirteen months of prior experience with the WCB at the time of his interviews, there is no evidence in the record that indicates he gained additional legal experience after his resignation. Without proof that Sanghvi improved his legal sUls after his tenure with the WCB, the defendants were justified in concluding that Sanghvi continued to be unqualified for the positions he sought.

As Sanghvi has failed to offer any proof that defendants retaliated against him, the Court will grant defendants' motion for summary judgment and dismiss the retaliation claim.

3. Hostile Work Environment

Sanghvi also contends that Frendel subjected him to

hostile work conditions that were continuous and severe. Sanghvi alleges Frendel was critical of his English, his accent, his education and diet and assigned plaintiff more calender days than the other attorneys on staff,

"Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Meritor *Savings Bank, FSB* Y, *Vinson*, 477 U.S. 57, 65 (1986). "To prevail on a hostile work environment claim, a plaintiff must demonstrate: (1) that his workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer," Schwapp, 118 EM at 110(citations omitted). Not all discriminatory conduct constitutes a hostile work environment. "The conduct alleged must be severe and pervasive enough to create an environment that 'would reasonably be perceived, and is perceived, as hostile

or abusive. '" Id., citing *Harris* v. Forklift Sys., Inc., 5 10 U. S. 17, 22 (1993), In Harris, the Supreme Court set forth various factors to be considered in determining whether conduct is "hostile",

> [W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances, which may include the frequency' of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a more offensive utterance; and whether it unreasonably interferes with an employee's work performance.

5 10 U.S. at 23.

"Although isolated, minor episodes of harassment do not merit relief under Title VII, even a single episode of harassment, if severe enough, can establish a hostile work environment." *Richardson, ISO* F.3d. at 437.

The Second Circuit has observed that the

classification of a work environment as hostile is a"mixed question of law and fact because it involves the application of a legal standard to a particular set of facts." Id Therefore, the question of a hostile work environment is one "especially well-suited for jury determination and summary. judgment may be granted only when reasonable minds could not differ on the issue." Id. "Although such questions may be ripe for summary adjudication where the underlying facts are undisputed, that the facts are undisputed does not automatically mandate summary judgment; rather, summary judgment is appropriate only where application of the law to those undisputed facts will reasonably support only one ultimate conclusion," Id. at 437-438.

Viewing all the circumstances surrounding Sanghvi's employment, the Court finds that the only conclusion a reasonable trier of fact could reach ill this case is that a hostile work environment did not exist. Although

Frendel's comments could be viewed as being motivated by a discriminatory animus, the infrequency of such comments negates a finding of severity. Sanghvi admits that these comments were made less than once a month. *Defendants' Motion for Summary judgment*, Exhibit P, p. 48. Neither were the comments physically threatening. Moreover, the comments did not unreasonably interfere with Sanghvi's work performance.

Accordingly, the Court will grant defendants' motion for summary judgment and dismiss Sanghvi's hostile work environment claim.

B. 42 U.S. C. §§ 1981 and 1983 Claims

Because this action involves state actors, Sanghvi has also asserted a Fourteenth Amendment claim brought pursuant to § 1983 for Frendel and Restina's alleged

violations of the Equal Protection Clause. Additionally, Sanghvi alleges a violation of his right to make and enforce contracts as protected by § 1981.

A § 1983 claim has two essential elements: (1) the defendant acted under color of state law; and (2) as a result of the defendant's actions, the plaintiff suffered a denial of his federal statutory, or his constitutional rights or privileges. *Eagleston v. Guido*,41 F.3 d 865, 872 (2d Cir-1994). The importance of a § 1983 claim in the employment discrimination context is that, unlike a Title VII claim, individual defendants other than the employer can be held

liable.[6] However, a claim for employment discrimination for ses of § 1983 involves the same burden-shifting framework applied in Title VII claims, *Annis v. County* of *Westchester*, 136 F.3d 239, 245 (2d Cir. 1998), citing St.*Mary's Honor Ctr v. Hicks*, 509 U,S. 502,506, n. 1 (1993). Similarly, a§ 1981 claim for employment discrimination applies the same *McDonnell Douglas* standard of liability used in Title VII claims.[7] *Lopezv.* S.B. Thomas, 831 F.2d 1184 (2d Cir. 1987).

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[6] The flip side to a § 1983 employment discrimination claim is that the employer, if a state agency, is immime *from* guit as are the individual defendants in their official capacity, *PennhurstStafeSchool & Hospital v. Holderman, 465 U. S. 89 (1984); Will v. Michigan Dept. of State Police*, 491*U.S. 59, 71* (1989)(states are not "persons" subject to suit under § 1983).

[7] A state is also immune from suit under § 198 1. This results because a § 1981 claim must be brought pursuant to § 1983 which provides the "exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units-" J8tj *v. Dallas Mdep. SchoolDist., 491 U.S. 70 1*,113 (1999); *Anderson* V. Condby, 15 6 R3 d 167, 176 (2d Cir, 199a).

As the Court has already concluded that Sanghvi's Title VII claims must be dismissed under *the McDonnell Douglas* framework, his § § 1981 and 1983 claims must likewise be dismissed.Accordingly, the Court will grant defendants' motion for summary judgmcnt as to Sanghvi's claims brought pursuant to §§ 1981 and 1983.

C. Family and Medical Leave Act Claim

Sanghvi alleges the defendants violated the Family and Medical Leave Act of 1993 ("FMLA!), 29 U.S.C. § 2601 *et seq.*, when Freadel denied his April 22, 1994 application for leave. *See Defendants' Supplemental Motion for summary judgment,* Exhibit A. Sanghvi contends that he applied for leave in order to care for his critically ill father in India. He maintains that Frendel was aware of his father's condition but nevertheless denied his request for leave.

Defendants assert that Sanghvi's FMLA claim is barred by the Eleventh Amendment to the United States Constitution. Alternatively, defendants contend the FX4LA claim should be dismissed for failing to state a valid claim.

1. Eleventh Amendment Immunity

Because the WCB is an arm of the state of *Now York*, the question of whether New York, vis-a-vis the WCB, is amenable to suit for claims brought pursuant to the FMLA must be addressed- The Eleventh Amendment to the United States Constitution provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S.CONST. amend. X1. This immunity from suit in federal court is a recognition that each state is a sovereign entity in our

federal system and is not subject to suit by an individualwithout its consent. *SeeSeminole Mbe ofFlorida v. Florida*, *517 U.S. 44*, 54 (1996).

Eleventh Amendment immunity however is not absolute, First, a state can unequivocally waive its sovereign immunity and consent to suit in federal court. Sanghvi contends that the WCB waived New York's immunity. He points to a June 13,1994 memorandum from the WCB to all employees which notifies WCB employees of their rights and obligations under the FMLA. *Plaintiffs Supplemental Motion for Summary Judgment*, Exhibit B.

Although the WCB memorandum is a clear expression of an employee's rights under the FULA, it is not an unequivocal waiver of New York's immunity from suit. Nowhere in the memorandum does the WCB set out an employee's enforcement rights under the *FMLA*. A simple statement of an employee's general rights under the FMLA

does not equate into an employee's ability to bring suit under the Act. The applicability of the FMLA to an employee does not thereby give him the right to enforce the provisions of the FNMA through a private right of action. Sanghvi fails to recognize that the Secretary of Labor can enforce the provisions of the FMLA by administrative action, 29 U.S.C. § 2617 (b). Because an action by the Secretary of Labor would not implicate Eleventh Amendment immunity concerns,[1] an employee of a state agency can enjoy the protections of the FMLA with the assurances that the federal government will secure compliance with the Act.

Even if a state has not validly waived its sovereign immunity, Congress can pass laws which give

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[1] In United States v. Mississippi, 380 U.S. 128,140-141(1965), the Supreme Court held that the Constitution presents no barrier to lawsuits brought by the United States against a State

individual citizens a right of action in federal court against an un consenting state. To abrogate a state's sovereign immunity, Congress must first unequivocally express an intent to do so by a clear legislative statement. *Seminole Tribe of Florida*, 517 U.S. at 55, Second, Congress must act pursuant to a valid exercise of power, namely, the enforcement provision of the Fourteenth Amendment to the Constitution."[9] Id

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[9] Section 5 of the Fourteenth Amendment provides that "Congress **shall** have power to enforce, by appropriate legislation, the provisions of this article."

The defendants do not contest that Congress expressly indicated its intent to abrogate state immunity when it enacted the FMLA [10] *See Kimel v. Florida Board of Regents, 120* S. Ct. 631 (2000)(analogous provisions of ADEA clearly expressed intent to subject the States to suit for money damages). Thus, the question the Court must answer is whether Congress, in enacting the FNILA, was property exercising its authority under Section 5 of the Fourteenth Amendment.

The Second Circuit has not yet spoken as to this question. The only circuit court that has considered the issue concluded that Congress lacked the power to abrogate the states' immunity from suit under the FMLA- Garreir *v. University of Alabama atBirmingham Bd Of Trustees, 193* F.3d 1214 (11' Cir. 1999). This Court finds the

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[10] The FMLA provides that an "employee' who violates § 2615 is liable for damages. 29 U.S.C. § 2617. An employer is defined as a "public agency"which includes a State or its agencies. 29 U. S.C. 2611(4).

Eleventh Circuit's reasoning persuasive and adopts its holding as grounds for dismissal of Sanglivi's FMLA claim against the WCB.

The Court's finding that Sanghvi's FMLA claim against the WCB is barred likewise precludes Sanghvi's FMLA claim against the individual defendants in their official and individual capacities. Sanghvi's official capacity claims cannot be maintained because a suit against an individual state officer in his official capacity is a suit against the state, *See Kentucky v. Graham*, 473 U.S. 159 (1985). Because Sanghvi's FMLA claim against the WCB is barred by sovereign immunity the individual defendants cannot be sued in their official capacity.

Sanghvi's individual capacity claims are likewise barred, but for different reasons. Sanghvi's statutory right of action under the FLMA is against an "employer."

29 U.S.C. § 2617. A suit against a public official in his individual capacity is not a suit against an "employer." Wascura v, Carver, 169 F.3d 683, 686(11' Cir. 1999)(a public official sued in his individual capacity is not an "employee' subject to individual liability)- Therefore, Sanghvi has no statutory right of action against the defendants in their individual capacities.

2. Merits of FMLA Claim

Even if the Court were to assume, *arguendo*, that Sanghvi had a right of action against the defendants in their individual capacities or that the claims were not barred by Eleventh Amendment immunity, his claims would nevertheless be dismissed on the merits because

he cannot demonstrate that he was entitled to leave under the FMLA or that he gave proper notice of the reason why his leave was necessary. The only competent evidence that Sanghvi provides to demonstrate he was entitled to leave is

his April 22,1994 request addressed to Frendel. Plaintiff's *Supplemental Motion for Summary Judgment*, Exhibit C. Although Sanghvi stated that he wished to take two months of leave to visit his father, he labels his request as "vacation" and does not indicate in any manner that his father suffered from any medical condition, much less a serious medical condition. Id.

Under the FMLA, an eligible employee can request up to twelve workweeks of leave in order to care for a parent with a "serious health condition." Other than requesting to spend time with his aging father, Sanghvi failed to specify any illness from which his father suffered that qualified as a serious health condition. Despite the lack of such information in his April 22, 1994 request, Sanghvi contends that Frendel was aware of the nature of his request, However, he offers no competent evidence to

support his position, Sanghvi points to Gerald Sultan's deposition as evidence that Frendel was aware of his father's medical condition. The only probative value that Sultan's testimony has is to point out what Sanghvi allegedly told Frendel and not what Sultan may have heard Sanghvi tell Frendel. Sultan states that "I remember you [Sanghvi] informing me of what happened Id. The fact that Sultan was present when Frendel denied Sanghvi's request is unavailing as Sultan's testimony sheds no light on what Sanghvi may or may not have told Frendel regarding the nature of Sanghvi's request. Even if Frendel were aware of the nature of Sanghvi's request for leave, Sanghvi's FMLA claim would still be subject to dismissal because he failed to give proper notice of the reason why his leave was necessary. Section 2613 of the FMLA provides that an employer may require a request for leave be supported by a certification issued by the health care provider of the parent of the employee. 29 U.S.C- § 2613. This certification requirement was also set out in the June

13, 1994 memorandum to WC13 employees. According to the defendants, Sanglivi never submitted such certification. *Defendants' Supplemental Motion for Summary Judgment*, Affidavit of Michael Braksmajer, Sanghvi contends that he attempted to provide Frendel with copies of documents to support his leave request, which included a physician's detailed description of his father's treatment.

The, existence of the "certification" documents is an essential element of Sanghvi's FMLA claim. Without them, he cannot prove he was entitled to the protections of the FMLA. The burden of proving the existence of the documents lies squarely on Sanghvi. Sanghvi's failure to produce the documents in support of his opposition to defendants' supplemental motion for summary judgment indicates that he will not be able to prove an essential element of his FML.A claim at trial. There can be no genuine issue as to any material fact where the non-moving party completely fails to prove an essential element of his

claim, *See Celotex Corp. v. Catrett, 477 U.S. 317,323* (1996)("The moving party is entitled to a judgment as a matter of law became the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof.").

Assuming, arguendo, that this Court would otherwise have jurisdiction to adjudicate the merits of Sanghvi's FNILA claim, the Court would nevertheless grant defendants' supplemental motion for summary judgment and dismiss Sanghvi's FMLA claims an the merits.

D. State Law Claims

Although 2 8 *U. S. C. § 13 67* confers supplemental jurisdiction over Sanghvi's state law claims, the assertion of supplemental jurisdiction may be declined if all claims over which thu Court has original jurisdiction are dismissed. 28 U~S.C. § 1367(3).Because all of Sanghvi's

federal claims will be dismissed by this ruling, the Court will not have original jurisdiction over his remaining state law claims.

Accordingly, the Court will dismiss Sanghvi's remaining state law claims without prejudice.

E. Reconsideration of Judge Johnson's January 6, 1999 Order

The Court will deny plaintifr s request to reconsider Judge Johnson's prior ruling dismissing Sanghvi's intentional infliction of emotional distress claim, conspiracy claims brought pursuant to 42 U.S.C. § § 1983 and 1985, and Fourteenth Amendment and New York Human Rights claims against the WCB and Frendel and Restina in their official capacity. Sanghvi has offered no new evidence which would compel this Court to disturb a prior ruling which has become the law of the case. As to the § 1981 claim,

the Court finds reconsideration unnecessary not only for the reasons set forth by Judge Johnson, but also for the additional reasons identified in Section B *supra*.

IV Conclusion

Based on the foregoing reasons, the Court will grant defendants' motion for Summary judgment and will dismiss Sanglivi's claims of race, color and national origin discrimination. The Court will grant defendants' motion as to the claims for retaliation, hostile work environment and constructive discharge. Likewise, the Court will dismiss Sanghvi's claims brought pursuant to the FMLA. The Court will decline to exercise supplemental jurisdiction over Sanghvi's remaining state law claims. Lastly, the Court will deny Sanghvi's request to reconsider Judge Johnson's January 6, 1999 ruling.

COPY SENT
DATE 04-05-00
BY RW
To: TLM, GK, Sanghvi
Speres

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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RASIK S. SANGHVI,

Plaintiff,

-against-

96 CV 5133
MEMORANDUM AND ORDER

PHILIP FRENDEL, FRANK RESTINA, and NEW YORK STATE WORKERS COMPENSATION BOARD,

Defendants.
----------X

APPEARANCES:

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JOHNSON, District Judge:

Before the Court is Defendants' pre-trial memorandum of law raising the following issues: 1) the applicable statute of limitations for Plaintiff's state law tort claims 2) Plaintiff's failure to state a claim of intentional infliction of emotional distress 3) Plaintiff's failure to state a claim pursuant to 42 U.S.C. § 1981 4) Plaintiff's failure to

state a claim for conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985 and 5) Eleventh Amendment immunity.

This Court notes that on May 5, 1997 it issued an order granting Defendants' motion to dismiss the complaint with respect to the Title VII claims against the individual defendants, Frank Restina and Philip Frendel. The allegations set forth in Plaintiff's complaint were discussed in that order and therefore familiarity with the facts of this case is assumed.

DISCUSSION

I. The Statute of Limitations

Plaintiff's state law tort claims include defamation of character, slander and intentional infliction of emotional distress. These claims are governed by a one-year statute of limitations. See N.Y. C.P.L.R. § 215(3).

Defendants argue these claims are barred by the one-year statute of limitations. The last day of Plaintiff's employment was December 23, 1994. According to Plaintiff's complaint, he filed a charge with the Equal Employment Opportunity Commission ("EEOC") on June 6, 1995 and received a Right to Sue letter on August 2, 1996. Plaintiff filed his complaint on October 21, 1996, two years after the last possible date that these alleged violations occurred and ten months after the expiration of the statute of limitations.

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Statute of limitations is an affirmative defense. See Fed. R. Civ. P. 8(c). It must be asserted in a party's responsive pleadings and is waived if not promptly pleaded. Davis v. Bryan, 810 F.2d 42, 44 (2d Cir. 1987). Defendants have raised this issue for the first time in their pre-trial memorandum of law. This Court finds that this affirmative defense is barred and will not dismiss the state law tort claims on this theory.

II. Failure to State a Claim

When considering a defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept as true factual allegations in the complaint and construe all reasonable inferences in the plaintiff's favor. Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit, 507 U.S. 163, 164 (1993); Hernadez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994). The complaint should be dismissed only "if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." Valmonte v. Bane, 18 F.3d 992, 998 (2d Cir. 1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A motion to dismiss may be made as late as "at the trial on the merits." See Fed. R. Civ. P. 12(h)(2); see also Moodie v. Federal Reserve Bank, 861 F.Supp. 10, 12 (S.D.N.Y. 1994).

Plaintiff alleges Defendants violated his civil rights under 42 U.S.C. § 1981 by discriminating against him on the basis of his national origin. See Complaint ¶ 8; see also Plaintiff's pre-trial memorandum of law at 9. Discrimination based on national

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origin per se is not covered under § 1981. Adames v. Mitsubishi Bank, Ltd., 751 F.Supp. 1548, 1559 (E.D.N.Y. 1990). Therefore, this claim is dismissed.

Additionally, Plaintiff alleges that Defendants violated his civil rights under 42 U.S.C. §§ 1983 and 1985 by means of a conspiracy. Complaints alleging conspiracies under §§ 1983 and 1985 are held to a heightened pleading standard. See Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993) (discussing pleading standards with respect to a § 1983 claim); Julian v. N.Y.C. Transit Auth., 857 F.2d 242 (E.D.N.Y. 1994) (discussing pleading standards with respect to a § 1985 claim). Plaintiff's complaint is void of any allegations necessary to sustain a conspiracy claim under §§ 1983 and 1985. Therefore, these claims are dismissed.

Plaintiff asserts a state law claim against Defendants for intentional infliction of emotional distress. To state a claim for intentional infliction of emotional distress, Plaintiff must allege 1) conduct beyond all possible bounds of decency 2) the intent to cause distress 3) severe emotional distress and 4) a causal link between defendant's conduct and plaintiff's distress Gay v. Carlson, 60 F.3d 83, 89 (2d Cir. 1995). The conduct at issue must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Martin v. Citibank, 762 F.2d 212, 220 (2d Cir. 1995) (internal citations omitted).

Plaintiff fails to demonstrate that the conduct alleged was so extreme as to exceed

the bounds tolerated by a civilized community. Id. The comments Plaintiff alleges were said by Defendants (i.e., the comments regarding his law degree from India, his accent, his vegetarianism) do not rise to level of outrageousness required under this tort. Because Plaintiff can not fulfill the first prong of the prima facie case for intentional infliction of emotional distress, it is unnecessary for the Court to discuss the remaining three prongs. Accordingly, Plaintiff's claim of intentional infliction of emotional distress is dismissed.

III. Eleventh Amendment Immunity

Defendants argue that the Eleventh Amendment bars Plaintiff's claims brought pursuant to 42 U.S.C. §§ 1981, 1983 and 1985. As discussed above, the §§ 1981 and 1985 claim are dismissed in their entirety for a failure to state a claim and the § 1983 is dismissed for a failure to state a claim with respect to the allegation of conspiracy. However, the Eleventh Amendment immunity issue must be discussed with respect to the alleged violation of the Fourteenth Amendment brought pursuant to § 1983 and with respect to the claims brought under the New York State Human Rights Law.

The Eleventh Amendment bars federal courts from entertaining suits by private parties against the states, absent a waiver on the part of the state or a valid congressional override. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); Farid v. Smith, 850 F.2d 917, 920-21 (2d Cir. 1988). This doctrine of sovereign immunity also

extends to certain government entities under the "arm of the state doctrine." Mullin v. P& R Educ. Servs., 942 F.Supp. 110 (E.D.N.Y. 1996). Moreover, the Amendment bars suits against state employees who are sued in their official capacities. When the state itself, rather than the state employee whose name appears in the caption, is the real party in interest, the suit is said to be brought against the employee in his "official capacity." Farid, 850 F.2d at 921. However, the Eleventh Amendment does not protect a state employee from personal liability if he is sued in his "individual" or "personal" capacity. Id. (citing Kentucky v. Graham, 473 U.S. 159, 166-67 (1985)).

The § 1983 and New York State Human Rights claims against the Workers' Compensation Board are dismissed as it is a suit against the "arm of the state" and is thereby barred under the Eleventh Amendment. With respect to the § 1983 and New York Human Rights claims against Frendel and Restina, suits for retroactive monetary damages can not be asserted against officials in their official capacity. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Claims may, however, be asserted against them in their official capacity for non-retroactive monetary damages. Id. Furthermore, the § 1983 and New York Human Rights claims against Frendel and Restina in their individual capacities are permissible for retroactive monetary damages. Id.

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IV. Claims under the Fourteenth Amendment and the New York State Human Rights Law

As discussed above, Plaintiff alleges violations of the Fourteenth Amendment and the New York Human Rights Law. In addition to the Eleventh Amendment defense argued by Defendants, a footnote in Defendants' pre-trial memorandum of law state that the amended Complaint does not set forth any allegations of a violation of the New York State Human Rights Law or the Fourteenth Amendment. See Defendants pre-trial memorandum of law at 2 n.1. Plaintiff's response to this cursory argument is merely to state that it is a contention without merit. See Plaintiff's pre-trial memorandum of law at 2.

Neither Plaintiff nor Defendant adequately argued this issue in their pre-trial memoranda. Because these statutes provide protection against employment discrimination, there is no reason at this time to dismiss the Fourteenth Amendment and New York Human Rights claims that are not barred by the Eleventh Amendment.

CONCLUSION

For the reasons stated above, the following claims are dismissed: 1) 42 U.S.C. § 1981 2) the state law tort of intentional infliction of emotional distress and 3) conspiracy claims brought pursuant to 42 U.S.C §§ 1983 and 1985 4) the Fourteenth Amendment claim brought pursuant to § 1983 and the New York Human Rights claim against the

Workers' Compensation Board, and against Frendel and Restina in their official capacity for retroactive monetary damages.

SO ORDERED.

U.S.D.J.

Dated: Brooklyn, New York
January 6, 1999

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THE LIST OF RELEVANT CASES CITED BY THE PETITIONER IN THE LOWER COURTS:

Castleman v. Acme Boot Co., 959 F.2d 1417, 1422 (7th Cir. 1992

DeMarco, 4 F.3d at 170

Equal Employment Opportunity Commission v. Ethan Allen Inc 44 F.3d 116 (2nd Cir. 12/30/1994

Metromedia Co. v. Fugazy, 983 F.2d 350, 361 (2d Cir. 1992)

Pierce v. F.R. Tripler & Co., 955 F.2d 820, 824 (2d Cir. 1992

Piesco v. Koch, 12 F.3d 332, 343 (2d Cir. 1993

Reeves v. Sanderson Plumbing Products Inc No. 99-536 (U.S. 06/12/2000).

St. Mary's Honor Center v. Hicks 509 U.S.at 511

Texas Department of Community Affairs v. Burdine 450 U.S. 450 U.S. at 256

Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039 (2d Cir. 1993) (U.S. 06/12/2000)

Distasio v. Perkin Elmer Corp.,

No. 97-7035

Furnco Constr. Corp. v. Waters,
438 U. S. 567, 577.

Grimes v. Texas Dep't of Mental
Health & Mental Retardation
102 F.3d 137,140 (5th Cir. 1996).

Harris v. Forklift Sys., Inc.,
510 U.S. 17, 21 (1993)

McDonnell Douglas Corp. v. Green,
411 U. S.792, 802,

Meritor, 477 U.S. at 67

Mullins v Campbell Soup Co.
56 F.3d 72 (9th Circuit1995)

Reed, 95 F.3d at 1177-78

Reeves v. Sanderson Plumbing
Products, Inc., No. 99-536
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2000.SCT.0042127 http://www.versuslaw
.com

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Kelly v. City of Oakland, No. 98-16482 (9th Cir. 11/23/1999)

Nichols v. Frank , 42 F.3d 503, 511 (9th Cir. 1994)

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ST. MARY'S HONOR CENTER v. MELVIN HICKS 1993.SCT.3939

Samuels v. Mockry, 77 F.3d 34, 36 (2d Cir. 1996)

Hindman v. Transkrit Corp., 145 F.3d 986, 77 Fair Empl.Prac.Cas. (BNA) (8thCir.06/01/1998)

Chock v. Northwest Airlines Inc.,113 F.3d 861, 863 (8thCir.1997)

Hardin v. Hussman Corp., 45 F.3d 262, 264 (8th Cir. 1995)

Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir.1994)

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)

Brooks v. Woodline Motor Freight, Inc.,852 F.2d 1061,1063(8th Cir. 1988)

Keathley v. Ameritech Corp., 187 F.3d 915 (8th Cir. 07/29/1999)

Kells v. Sinclair Buick GMC Truck, Inc., No. 99-2795(8th Cir.04/27/2000)

Widoe v. District #111 Otoe Cty. Sch., 147 F.3d 726, 731 (8th Cir. 1998)

Rothmeier,85F.3dat 1737

Denesha v. Farmers Insurance Exchange, 161 F.3d491,78

Fair Empl.Prac.Cas. (BNA) 691 (8th Cir. 11/03/1998)

Abrams v. Lightolier, 50 F.3d 1204 (3rd Cir.03/24/1995)

Gallo v. Prudential Services, 22 F.3d 1219, 1224 (2d Cir. 1994)

Montana v. First Fed. Sav. & Loan Assn., 869 F.2d 100, 103 (2d Cir. 1989)

LUTEN v. DAILY NEWS, L.P.New York Law Journal April 17, 2000 SOUTHERN DISTRICT

Fisher v. Vassar College, 114 F.3d 1332, 1336 (1997)

Segal, 63 F. Supp. 2d at 378 n. 3

Choudhary v. Polytechnic Institute of New York, 735 F.2d 38, 44 (2d Cir.)

Leslie v. Banctec Service Corp., 928 F. Supp. 341, 349

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 801 (8th Cir. 1994)

Hicks v. St. Mary's Honor Center, 113 S. Ct. at 2747

PRICE WATERHOUSE v. HOPKINS 490 U.S. 228, 109 S. Ct.1775, 104 L. Ed. 2d 268, 57 U.S.L.W. 4469

Kampouris v. St. Louis Symphony Society, No. 99-2704 (8th Cir. 04/28/2000)

Jacob v. New York, 315 U.S. 752 (1942)

Meritor Savings Bank FSB v Vinson 477 U.S. 57, 65 (1986)

Schwapp 118 F3d at 10

Richardson 180 F 3d at 437

Harris v. forklift Sys. Inc

Annis v Country of Westchester 136 F.3d 239, 245 (2nd Circular 1998)

Lopez V. S.B. Thomas 831 F.2d 1184 (2d Cir.1987)

City of Schenectady v State Division of Human Rights,37 NY2d 421,427

In Wascura v. Carver, 169 F.3d 683, 5 Wage & Hour Cas.2d (BNA) 265, 75 Empl. Prac.Dec. (11th Cir. 03/09/1999)

Welch v. Laney, 57 F.3d 1004 (11th Cir.1995)

Price v. City of Fort Wayne, 117 F.3d 1022, 3 Wage & Hour Cas.2d (BNA) 1729 (7th Cir. 06/27/1997)

Andrews, 98 F.3d at 1079

Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)

Gould Inc. v. United States, 67 F.3d 925(Fed. Cir.10/11/1995)

Conley v. Gibson , 355 U.S. 41, 45-46,2 L.Ed. 2d 80,78 S.Ct.99(1957)

Jatoi v Hurst-Eule ss-Bedford Hosp. Authority 807 F.2d 1214, 42 FEP 1235 (5th Circuit 1987)

Surinder Chandoke v. Anheiuser Busch 843 F.supp 16

Minetos v City of NY 875 F supp. 1046, 68 FEP 355 (SD NY 1995)

LIST OF DOCUMENTS IN APPENDIX FOR PETITON FOR ENBANC & PENAL HEARING IN COURT OF APPEALS:

1.Individual traineeship Plan Evaluation) for Senior Attorney Trainees by Donald Lazarus **12-2-93 to 6-2-94**. 2 pages.

2. Performance Appraisal & Rating by Philip Frendel **12-2-93 to 6-2-94** 1 page.

3. Performance Appraisal & Rating by Philip Frendel 6-2-94 to 12-1-94

LIST OF DOCUMENTS IN APPENDIX FOR REPLY BRIEF IN COURT OF APPEALS:

1. Relevant Frendel deposition pages.
2. Relevant Restina deposition pages.
3. W.C.B Chairwoman's letter.
4. Petitioner's letter to W.C.B. Chairwoman
5. Sultan's relevant deposition pages.

LIST OF DOCUMENTS IN APPENDIX ON APPEAL FROM UNITED DISTRICT COURTS

Lower Court Docket Entries

The Original Amended Complaint

Judge Sterling Johnson Jr. Memorandum and Order

Statement of Evidence

Regarding Ineffective Counsel

Negative Ratings One (Claimed Manufactured Evaluation Part1)

Frendel Deposition

Malchiodi Letter

Miuccio Letter

Solomon Deposition

Restina Deposition

Molinari Letter

GOER's Letter

Test Score

Leave Rejection

Sultan Deposition

Canvass Letter, No interview Needed

Prior Outstanding Ratings

Detail Outstanding

Sanghvi Deposition

Prior Board Evaluation Part 1& 2

Golas Affidavit

Miuccio Affidavit

FMLA Immunity Waiver

Judgment Appeal from-Hon. Tucker L. Melancon

Notice of Appeal

Notes on Damages

As there are different State and Federal violations, different laws, codes and common law applications and claims as allowed by the Federal and State constitutions and legal principles and tools and different parties are liable, the damages have been grouped in a table.

The plaintiff claims that three generations of his family members have been permanently hurt. The plaintiff's most productive years of his life and his career in law, which was achieved after very hard work and at great sacrifice have been ruined. Nothing, no amount of money can ever make him whole again. For the civilized human beings death is hundred times better than injustice, scorn, bias discrimination, hatred -for no fault of his own, humiliation, mental torture and suffering of their family members and their dying fathers. Therefore, a detailed table of damages is not for sake of money.

There is another reason that the plaintiff wants the maximum possible damages, in each area of violations, are awarded. The plaintiff had never thought of or experienced the realty which Congress has commented upon in their following report:

GLASS CEILING

Title II of Pub. L. 102-166 provided that:

"SEC. 201. SHORT TITLE.

"This title may be cited as the 'Glass Ceiling Act of 1991'.

"SEC. 202. FINDINGS AND PURPOSE.

"(a) Findings. - Congress finds that -

"(1) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business;

"(2) artificial barriers exist to the advancement of women and minorities in the workplace;

"(3) United States corporations are increasingly relying on women and minorities to meet employment requirements and are increasingly aware of the advantages derived from a diverse work force;

"(4) the 'Glass Ceiling Initiative' undertaken by the

Department of Labor, including the release of the report entitled 'Report on the Glass Ceiling Initiative', has been instrumental in raising public awareness of -

"(A) the underrepresentation of women and minorities at the management and decisionmaking levels in the United States work force;

"(B) the underrepresentation of women and minorities in line functions in the United States work force;

"(C) the lack of access for qualified women and minorities to credential-building developmental opportunities; and

"(D) the desirability of eliminating artificial barriers to the advancement of women and minorities to such levels;

.....

The plaintiff was born with pleasant and positive nature and had met mostly decent people in his life when all of a sudden he was hit with a lightening, which is threatening his positive nature and may make him cynic despite his consciousness about the irony of it. The plaintiff also realized that despite statues and bills in congress, laws and general abhorrence, the perpetrators of illegal acts can easily get away with the violations of others' rights by

passing the burden of constraints of time, cost of justice, weakness and fickleness of individual against institutions and lack of feasible mechanism, tools and infrastructure in the prevailing legal system on the victims, because of universal but simplistic excuse of possible abuses and volume. The plaintiff, who is an attorney himself, has felt like carrying his own cross or like an apprentice Physician who is required to operate on his own brain, in his this journey for vindication. It can be imagined, how difficult it could be to be vindicated, for other people who are not familiar in legal discipline. In these circumstances, not for the reason of punishment of any party but for the reasons of lessons to be learned by other indecent people who slip into the decision making responsibilities and who put at knot the good work of many civilized persons that the plaintiff wishes that maximum possible damages be allowed if the plaintiff is able to prove his claims.

If the court or jury will reinstate the plaintiff with his full seniority credit as a result of proving his violations, the plaintiff will be instantly restored to

Half his original whole self and will accordingly accept the adjusted compensatory damages but will retain right to Maximum punitive damages for the above stated reasons of public good.

MANDATE

EDNY/BKNY
96cv5133M
MELANCON

SUMMARY ORDER

United States Court of Appeals
For the Second Circuit

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, Or, IN ANY CASE FORPURPOSES OF COLLETERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of December two thousand.

PRESENT:

Hon. John M. Walker, Jr.,

Chief Judge,

Hon. Rosemary S.

Pooler,

Circuit Judge.

Hon.Janet C. Hall,*

RASIK S. SANGHVI,

Plaintiff -Appellant,

v.

00-7838

PHILIP FRENDEL, FRANK RESTINA, WORKERS' COMPENSATION BOARD (OF NEW YORK STATE)

Defendants-Appellees.

* The Honorable Janet C. Hall of the United States District Court for the District of Connecticut, sitting by designation.

ISSUED AS MANDATE: MAR 2 6 2001

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

Filed Clerk,
U.S. Dist. Ct. E.D.N.Y.

Rasik S. Sanghvi

Civil Action No. 96-5133

v.

Judge Tucker L.Melancon

Philip Frendel et.al

JUDGMENT

In accordence with the Memorandum ruling issued on this date , IT IS FURTHER ORDERED that the motion for summary judgment and the supplemental motion for summary judgment filed by the defendants Philip Frendel, Frank Restina and the Workers' Compensation Board of New York State are GRANTED and plaintiff's federal claims are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the motion for summary Judgment filed by defendants Philip frendel, Frank Restina and the Workers' Compensation Board of New York State is GRANTED and plaintiff's state law

claims are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the motion for reconsideration of Judge Sterling Johnson's Memorandum Order dated January 6, 1999 filed by plaintiff Rasik S. Sanghvi is DENIED.

Thus done and signed this 5th day of April, 2000 at Lafayette, Lousiana.

Signed Tucker L. Melancon
United States District Judge
Sitting by designation

Copy sent date 04-05-00 by RW To TLM
GK (fax) Sanghvi, Speres

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